KONG JUN KIET & ORS v. INSP MUHAMAD AZAMUDDIN MOKLAS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MUNIANDY KANNYAPPAN J
[CRIMINAL APPLICATION NO: WA-44-57-06-2024]
1 JANUARY 2025

Abstract – *Article 5(1) of the Federal Constitution guarantees the personal liberty of an individual from unlawful and/or illegal detention. Hence, in a case involving unlawful detention, although at the time of hearing of the application of the writ of habeas corpus, the detainee has been released, the matter in respect of his detention is a live issue and could still be determined by the court. However, where the matter involves assessment of damages and compensation for the unlawful arrest and detention, it is to be decided by a civil court as such matter involves dispute of facts to be distilled by way of testimonial evidence.*

CRIMINAL PROCEDURE: *Arrest – Unlawful detention – Applicants not set free even after released by order of Magistrate – Whether constituted unlawful detention – Whether assessment of damages and compensation for unlawful arrest and detention entailed dispute of fact – Whether cause of action in tort for false imprisonment – Whether to be decided with testimonial evidence – Whether action lie in civil court*

The applicants were alleged to have been arrested on 12 June 2024 at about 2.30pm to 3pm. They were produced before the Magistrate within 24 hours on 13 June 2024 for an order of remand. However, despite the application being refused by the Magistrate, they were still kept under arrest and detention until 7pm. They were then re-arrested and once again produced before the Magistrate on 14 June for a remand application. They were duly released on 14 June 2024 at 11am. However, the applicants alleged that they were only allowed to leave the police station at about 7pm on 14 June 2024, on the pretext the papers for police bail were being managed and prepared. Hence, the bane in this matter was that the applicants, although released by an order of the Magistrate, were not set free or at liberty until about 7pm. That period of about eight hours was alleged by the applicants to be a period of unlawful detention by the police. The applicants, therefore, moved this court, other than for a writ of *habeas corpus* and other incidental orders, for a prayer to order payment of damages and compensation, and generally, other appropriate reliefs. The respondents raised the following preliminary objections: (i) the affidavit in support ('AIS') of the application for a writ of *habeas corpus* by the applicants, was not deposed by them or any of them but by their family member who had no direct interest in their detention, since

she was not the one who was detained; (ii) since the applicants had been released from further detention, there was no pending matter or *lis* for deliberation and determination and hence, it ought to be dismissed *in limine*; and (iii) the application stood altered in its nature and character, as it has turned out to be academic, thus obviating the need for determination by this court. The issue herein was not the fact that the applicants had been released from detention at the time of hearing of the application for a writ of *habeas corpus*, but the legality of the detention of the applicants, which they had endured over the period of time when they were detained without just cause pursuant to the law.

Held (dismissing application):

(1) This court took judicial notice of the notorious fact that since the applicants were remanded pending criminal investigation, their communication with family members was restricted to only a telephone call pursuant to s. 28A(2) of the Criminal Procedure Code. In that circumstance, the deponent, the next of kin to the second applicant, who had deposed the AIS on behalf of the applicants, was entitled to do so in order to bring to the knowledge of this court that the applicants were unlawfully detained and their personal liberty had been deprived pursuant to art. 5(1) and (2) of the Federal Constitution. Pursuant to art. 5(2), only a complaint is necessary. As such, the AIS was validly deposed by the deponent followed by a certificate of urgency to have the matter of detention of the applicants heard swiftly by this court. In any event, later, the second applicant had filed and served an affidavit, which cemented the application by the applicants for a writ of *habeas corpus* in encl. 1. (para 5)

(2) The applicants were released from remand but were restrained from liberty, as they were not set free after the application for an order of remand was refused by the Magistrate. As such, subject to proof on the allegation of unlawful detention of the applicants by the respondents on a balance of probabilities, an action may lie in a civil court premised on a cause of action in a tort of false imprisonment. It was then for the civil court, and not this court, to decide on those allegations of fact for an ultimate determination if the applicants were falsely imprisoned for the alleged period of eight hours or more. Hence, this court did not embark further. It was not for this court to be infused with the assessment of damages and compensation for the unlawful arrest and detention, as it entailed dispute of facts which could only be distilled by way of testimonial evidence from both the applicants and the respondents who were responsible and for the court to make an informed decision on the appropriate relief to be accorded to the applicants. Bereft of that testimonial evidence, this court was unable to decide on that issue, although it was a live issue. (paras 16 & 17)

Case(s) referred to:
Khaeryll Benjamin Ibrahim v. Ketua Polis Negara & Ors [2010] 6 CLJ 777 HC ***(refd)***
Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC ***(dist)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors [2000] 2 CLJ 805 HC ***(refd)***
PP v. Kok Khee [1963] CLJU 94; [1963] 1 LNS 94 HC ***(refd)***
Saw Kim Hai v. R [1956] MLJ 23 ***(refd)***
Syed Ali Mohamed Kutti v. Menteri Dalam Negeri, Malaysia & Anor [1997] CLJU 377; [1997] 1 LNS 377 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 28(3), 28A(2), 117(1), 365, 366, 367
Federal Constitution, art. 5(1), (2), (4)
Penal Code, s. 420

For the applicants - Dinesh Muthal & Jefry Wong; M/s Dinesh Muthal
For the respondents - Nur Syahidah Mohamad Kamil; FC

Reported by S Barathi

JUDGMENT

Muniandy Kannyappan J:

Preface

[1] This case pertains to a proceeding which is unique in its nature and character. This is because applicants, who were detained pursuant to an order of remand by the Magistrate have been released. Thus, they were not in detention at the point of hearing of this application. However, it is alleged that the detention of the applicants was unlawful and illegal pursuant to the law applicable to them. A subsequent application for a remand order made by the first respondent (R1) to further detain the applicants for their involvement in an offence of cheating pursuant to s. 420 of the Penal Code (PC/Act 574) was refused and dismissed by the Magistrate who had presided over the application.

[2] Nonetheless, the applicants *via* their counsel have persisted to continue with their application, thus moving this court to seek an order or a declaration that they have been illegally detained. This is to enable them to avail themselves for a valid claim against the respondents for unlawful and/or illegal detention.

Preliminary Objections Raised

[3] Since that was the premise of their insistence, the respondents, *via* its Federal Counsel (FC), raised in the main three preliminary objections in order to thwart the application by the applicants. The objections are:

A (i) the affidavit in support (AIS) of the application for a writ of *habeas corpus* (HC) by the applicants, was not deposed by them or any of them but by their family member who has no direct interest in their detention, since she was not the one who was detained, in order to state that the applicants were unlawfully detained.

B (ii) since the applicants have been released from further detention, there is no pending matter or *lis* for deliberation and determination by this court, hence, it ought to be dismissed *in limine*.

(iii) to that extent, it is further iterated by the respondents that the C application by the applicants stands altered in its nature and character, as it has turned out to be academic, thus obviating the need for determination by this court.

[4] By way of reply, the applicants have replied to the objections raised, on the following terms, briefly put:

D (i) the AIS was not deposed by the applicants or any of them, because they were on remand pending investigation and as such, they were under restraint to depose an affidavit personally, thus allowing the deponent to pursue with the case.

E (ii) reliance is on the decision which had been handed down by our apex court that although the applicants have been released and a writ of *habeas corpus* does not lie, but their detention during the remand and subsequently has to be considered wholly and in its entirety in order for this court to ultimately decide if the detention of the applicants was lawful.

F (iii) on that plank, the issue raised on the legality of their detention is a live issue and contended to be subject matter of a declaration by this court.

Analysis

[5] Perusing the AIS filed on behalf of the applicants, there exists G sufficient material before this court alleging that the applicants have been unlawfully detained. This court is also in a position to take judicial notice of the notorious fact that since the applicants were remanded pending criminal investigation, their communication with family members was restricted to only a telephone call pursuant to s. 28A(2) of the Criminal H Procedure Code (CPC/Act 593). In that circumstance, the deponent who is the next of kin to the second applicant, had deposed, the AIS on behalf of the applicants was entitled to do so in order to bring to the knowledge of this court that the applicants were unlawfully detained and their personal liberty has been deprived pursuant to art. 5(1) and 5(2) of the Federal Constitution I (FC). Pursuant to art. 5(2), only a complaint is necessary. Consequently, the applicants moved this court urgently, for them to be released forthwith. As

such, in view of the urgency of the matter at hand, the AIS is validly deposed by the deponent, followed by a certificate of urgency to have the matter of detention of the applicants heard swiftly by this court. In any event, later, the second applicant had filed and served an affidavit, which cements the application by the applicants for a writ of *habeas corpus* in encl. 1.

[6] That affidavit stays on the court's record, although an application was made by the respondents to have it set aside or struck out and not to be considered by this court at all. It is a fact that any document filed with the court, becomes part and parcel of the court proceeding for which it was filed, thus it cannot be struck out by one party willy-nilly. It stands for consideration by the court to determine and decide on the matter ultimately. Like in this case, the ultimate issue is that the applicants are alleged to have been unlawfully detained for a considerable period of time, despite them being released from remand by the Magistrate, yet they were not set at liberty but further detained without any lawful order under the law. Hence, the basis for the applicants to move this court for a declaration that there exists unlawful detention, although a writ of *habeas corpus* would not lie, as they have been released. Thus, the affidavits filed, both the AIS and the further affidavit by the second applicant, are relevant and pertinent in its content for the court to know exactly the narrative as to what has happened to the applicants when they were detained, in order for them to mount an argument in this court that they were unlawfully detained. Moreover, the reasons afforded by the deponent in her AIS render the requisite sufficient cause as to why she had to depose the said affidavit, as required under s. 367 of the CPC. It reads as follows:

> The affidavit required by s. 366 shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which case it shall be made by some other person.

[7] Surveying s. 365 of the CPC, it is apparent that the law stipulates that the High Court may, whenever it thinks fit, direct that any person who is alleged to be illegally or improperly detained in public custody be set at liberty. Section 366 of the CPC further strengthens the position that every application to bring up before the court a person alleged to be illegally or improperly detained in custody shall be supported by affidavit stating where and by whom the person is detained and, so far as they are known, the facts relating to the detention, with the object of satisfying the court that there is probable ground for supposing that the person is detained without just cause. Moving on, s. 367 of the CPC renders that the affidavit required by s. 366 of the CPC shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or other sufficient cause, he is unable to make it, in which case it shall be made by some other person. That some other person, in this case, is the relative of the second applicant who

had deposed the AIS. Therefore, the provisions are abundantly clear to the extent that the High Court, which is moved jurisdictionally for a writ of *habeas corpus* must only be informed of an allegation of illegal or improper detention without just cause. To reiterate, only a complaint is necessary pursuant to art. 5(2) of the FC, with no specification of who should be the complainant. Hence, the basis for s. 367 to stipulate that if the applicants themselves or any of them could not depose an affidavit to advance their allegation of unlawful and/or illegal detention, by reason of restraint, like in the present case, as they were continually on remand, it could be done by another person to advance a complaint to this court for a writ of *habeas corpus*.

[8] The law is stipulated such as it syncs with art. 5(1) of the FC, which guarantees the personal liberty of an individual from unlawful and/or illegal detention. In that respect, the past precedents referred to by the respondents are inapplicable as it is sufficient under the law for the allegation of unlawful and/or illegal detention is brought to the knowledge of the court *simpliciter* pursuant to art. 5(2) of the supreme law and the law as found in s. 367 of the CPC does not insist that it has to be always the detainee, like the applicants or any of them in this case. The precedents referred to are *Khaeryll Benjamin Ibrahim v. Ketua Polis Negara & Ors* [2010] 6 CLJ 777; *Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors* [2000] 2 CLJ 805 and *Syed Ali Mohamed Kutti v. Menteri Dalam Negeri, Malaysia & Anor* [1997] CLJU 377; [1997] 1 LNS 377. To reiterate, both the supreme law and the CPC do not exclude the next of kin of the second applicant from deposing the AIS. In any event, the subsequent filing of the affidavit by the second applicant in fact fortifies the allegations contained in the AIS. Thus, it is highly prejudicial to the applicants, for this court to have it set aside or struck out, as to do so would be without a valid basis under the law.

[9] Ensuing back to the case at hand, the applicants have moved this court (other than for a writ of *habeas corpus* and other incidental order) also for a prayer to order payment of damages and compensation and also generally other appropriate relief. However, there is no specific prayer for a declaration to be made by this court that the applicants were unlawfully and/or illegally detained. The prayer is:

> (i) Responden-responden diperintahkan untuk membayar gantirugi dan pampasan dan
>
> (ii) Perintah dan/atau relif lain yang difikirkan patut atau diberi oleh mahkamah yang mulia ini berdasarkan alasan-alasan yang dinyatakan didalam affidavit sokongan yang diikrarkan dan dilampirkan bersama yang difailkan di mahkamah yang mulia ini untuk menyokong usul ini.

[10] The relief prayed for is premised on the following factual matrix:

(i) the applicants were arrested on 12 June 2024 at about 2.30pm to 3pm.

(ii) they were produced before the Magistrate within 24 hours on 13 June 2024 for an order of remand.

(iii) it was refused by the Magistrate.

(iv) but they were still kept under arrest and detention at the Brickfields Police Station until about 7pm. They were then re-arrested.

(v) therefore, the period of detention from 12 June 2024 to 13 June 2024, was for 24 hours, and later produced before the Magistrate on 13 June 2024. An application for a remand order was made but it was rejected.

(vi) subsequently, they were rearrested on 13 June 2024. Once again, they were produced before the Magistrate on 14 June 2024 for a remand application, within the 24 hours.

(vii) thus, the detention for a period of 24 hours is in accord with art. 5(4) of the FC and s. 28(3) of the CPC, which renders the following:

> Article 5 (4)
>
> Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.
>
> Section 28
>
> (1) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate.
>
> (2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.
>
> (3) Such period shall not in the absence or after the expiry of a special order of a Magistrate under s. 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

(viii) the applicants were duly released on 14 June 2024 at 12 noon. The submission by the respondents in encl. 6 says 11am. This was pursuant to s. 117(1) of the CPC, which provides:

> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s. 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately

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> transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
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> ...
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> Hence, if there are no grounds for believing that the accusation or information against the applicants is well-founded, further detention would be unnecessary and the Magistrate shall order them to be released forthwith, which was so in the present case.

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(ix) the bane in this matter was that the applicants, although released by order of the Magistrate, they were not set free or at liberty until at about 6pm, which is for a period of about six to seven hours.

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(x) they were only allowed to leave the police station at about 6pm on 14 June 2024, on the pretext the papers for police bail were being managed and prepared.

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(xi) therefore, save for the period of about eight hours, from 11am to 7pm on 14 June 2024, their detention is justified by the law pursuant to art. 5(4) of the FC.

(xii) that period of about eight hours is alleged by the applicants to be a period of unlawful detention by the police.

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[11] Hence, this court is mindful of the fact that the applicants were not released forthwith, once the application for a remand order was dismissed by the Magistrate.

Status Of Application

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[12] Counsel for the applicants has implored to this court on various decisions made by the apex court, in the main *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177; [2022] 3 MLJ 203, emphasising that although at the time of hearing of the application for a writ of *habeas corpus*, the applicants have been released, the matter in respect of their detention is a live issue and could still be determined by this court, thus not rendered academic. In the case of *Lei Meng,* the detenu was in continued preventive detention, *albeit* under a different provision of the law and on a separate detention order. The principles of law derived from that decision of the apex court are the following:

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> The state of the law is that in every *habeas corpus* application challenging detention, the inquiry by the court focuses on the application as of the date of filing of the same. The legality of a detention must be viewed as a single overarching transaction. The legal findings are summarised as follows:

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(i) The High Court's constitutional duty to assess the legality of any detention-especially preventive detention starts from the date of filing of the *habeas corpus* application assuming that the detainee was, at the time he filed it, under detention;

(ii) In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(iii) The jurisdiction of the High Court or a High Court judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for *habeas corpus*;

(iv) Viewed in this way and giving Article 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention;

(v) Similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(vi) Finally, the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'.

(vii) The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge. The legality of detention is to be adjudicated by reference to the date the application for a writ of *habeas corpus* is filed.

[13] Thus, pursuant to *Lei Meng*, the issue is not the fact that the applicants have been released from detention at the time of hearing of the application for a writ of *habeas corpus*, but the legality of the detention of the applicants, which they had endured over the period of time when they were detained without just cause pursuant to the law. The case of *Lei Meng* and its sequel, by virtue of the doctrine of *stare decisis*, is binding on this court. But its binding effect is always diluted by virtue of the facts and circumstances of each case that comes before the court, like the present. It is not a situation that it is one case that fits all situation and/or position.

Findings And Conclusion

[14] As such, in the present case, the applicants were not under detention any further, but, released from remand on 14 June 2024 but restrained from liberty, until a later time. They were not set free due to reasons that some administrative issues affecting them have to be sorted out and managed. It was also averred that the applicants may have to be remanded further

pending investigation of other suspected offence of cheating, but this time at Malacca. Ultimately, all this averment did not see the light of the day, and the applicants were then released at about 6pm on 14 June 2024.

[15] In sum total, the alleged unlawful detention of the applicants was for a period of about eight hours, on 14 June 2024, commencing from 12 noon, when the Magistrate had refused an application for a remand order pending investigation. But the fact remains that they were only released at 6pm on 14 June 2024.

[16] *Albeit* being mindful of the doctrine of *stare decisis*, wherein the decisions of the apex court are binding on this court, but it could be distinguished on the facts and circumstances of the present case. The detenus involved in those cases were under continued unlawful detention, *albeit* on a different order of detention. But, in the present case, the applicants were released from remand but restrained from liberty as they were not set free after application for an order of remand was refused by the Magistrate. As such, subject to proof on the allegation of unlawful detention of the applicants by the respondents on a balance of probabilities, an action may lie in a civil court premised on a cause of action in a tort of false imprisonment. It is then for the civil court and not this court to decide on those allegations of fact for an ultimate determination if the applicants were falsely imprisoned for the alleged period of eight hours or more as to be discerned by the applicants, and if so, would damages lie for their wrongful restraint, confinement and imprisonment for that period of time.

[17] This court did not embark further for the respondents to reply to the allegations of unlawful detention, as it entails a dispute of facts entailing a civil claim in tort, thus, it is best for the matter to be pursued by the applicants by way of a writ action in the civil court, since the axis of their claim is for damages and compensation resulting from the unlawful detention. This is on the premise, an arrested person who is unlawfully arrested and detained may bring a civil action for damages, as decided by our courts in the case of *PP v. Kok Khee* [1963] CLJU 94; [1963] 1 LNS 94; [1963] MLJ 362. It was also decided in the case of *Saw Kim Hai v. R* [1956] MLJ 23 that a person can only claim damages for false imprisonment due to wrongful arrest and restraint. The courts, being the last bastion of justice, allow individuals, like the applicants, to seek legal redress if the respondents have infringed their constitutional right guaranteed by art. 5(1) of the FC, where their personal liberty was deprived when they were kept under arrest and detention after being released from remand by the Magistrate. Such redress is intended as a protection of the rights of the applicants against encroachment by the law enforcement personnel. The *raison d'etre*, being the liberty of the applicants is jealously guarded by the supreme law of our

country both in content and application. However, it is not for this court to be infused with the assessment of damages and compensation for the unlawful arrest and detention, as it entails dispute of facts which could only be distilled by way of testimonial evidence from both the applicants and the respondents who are responsible (not all who are cited) and for the court to make an informed decision on the appropriate relief to be accorded to the applicants. Bereft of that testimonial evidence, this court is unable to decide on that issue, although it is a live issue to be determined by the court, as decided in the case of *Lei Meng*.

[18] On that plank, the prayer to this court by the applicants is dismissed. Likewise, the criminal application for a writ of *habeas corpus* as per encl. 1 is also dismissed, as the *lis* does not exist anymore, since the applicants have been released from detention.

Application dismissed.